

Western New England Law Review

Volume 19 19 (1997)

Issue 1 *FIRST ANNUAL NORTHEASTERN
PEOPLE OF COLOR LEGAL SCHOLARSHIP
CONFERENCE*

Article 9

1-1-1997

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Recommended Citation

Reginald L. Robinson, Lisa C. Ikemoto, Dorothy A. Brown, Carlos Cuevas, and Robert P. Wasson Jr., *PANEL: SPLIT PERSONALITIES: TEACHING AND SCHOLARSHIP IN NONSTEREOTYPICAL AREAS OF THE LAW*, 19 W. New Eng. L. Rev. 73 (1997), <http://digitalcommons.law.wne.edu/lawreview/vol19/iss1/9>

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PANEL

SPLIT PERSONALITIES: TEACHING AND
SCHOLARSHIP IN
NONSTEREOTYPICAL AREAS OF
THE LAW

REGINALD LEAMON ROBINSON*

This panel focuses on split personalities, something we have all experienced and through which we have suffered. Part of what we will focus on is teaching and scholarship in nonstereotypical subjects. We have an excellent panel with us today: Lisa Ikemoto will talk about race, class, gender, and sexual orientation as they relate to bio-ethics; Dorothy Brown will relate her comments to tax law; Carlos Cuevas will relate his comments to bankruptcy law; and Robert Wasson will relate his comments to general areas of law. I teach Property and so I will make a few remarks about that topic and also give you a little bit of personal history.

"Split personalities": I think that is an appropriate way of framing what it is we have to experience when we enter the academy. "Split," because in many ways we live our entire lives trying to find that certain, sometimes very unsettled, space where we or our many personalities have to exist. We are really trying to move between what we *want* to be, what we feel we *need* to be, and what people *expect* us to be. I think this conflict, in many ways, awaits us when we enter the academy.

I thought it was interesting yesterday that Jenny Rivera was talking about *presente*.¹ We had comments from the floor that brought home the fact that when we show up, sometimes that, in and of itself, is *presente*. I think it is even more clearly *presente* when we show up and we have a commitment to doing something more than just getting our students through what may be considered a bar-related or doctrinal course.

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1. "*Presente*" means "I am here."

Not only are our personalities split because we have to live our lives generally in that way, but they are split even more when we enter the academy. Many of us are shocked and surprised at this reality, and I can tell you, quite honestly, that I was not as forewarned as some of the panelists. I had to experience it directly and I can tell you it was very painful.

I think that in addition to split personalities, we are talking about marginalized personalities. I want to talk about how that sort of marginalization relates to the institutional culture in which we find ourselves. I also want to relate marginalization to what students do when they react to us and push us into that very unsafe, unsettled space where we have to quickly find what personality we need in order to deal with our present circumstances.

So often I have heard Jerome Culp say, "All rules is local," and that is so true. We will relate different experiences to you today. Sometimes they will not fit perfectly with each and every institution at which some of you are teaching (suffering may be a better word) because every institution has its own degree of dysfunction, every institution has its own way of expressing that dysfunction, and therefore, every institution has its own way of trying to cope adequately with our progressive mission. This pedagogical approach might, in many ways, unsettle what it is they are supposed to be doing.

Let me talk about my experiences. I started teaching at Whittier Law School in 1991. About two years later, I was a visiting professor at the University of San Francisco School of Law for a semester and then at the University of Connecticut School of Law. I have been on the faculty at Howard University for about two years.

When I started teaching Property, I chose a textbook that did for me what I really wanted to do, which was to introduce race and gender in class. I also introduced sexual orientation issues through hypotheticals because the textbook did not do this very well. I thought that if I chose a textbook that had in it everything that I wanted it to have, I would not have to import that material. I would not have to have someone say: "This is Reggie's stuff." They could look in the textbook and say: "Well, it must be a relevant way of looking at the law because it's already in here." Singer's book on Property² was not on the market yet, so I taught out of Richard

2. See JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (1993).

Chused's textbook.³

What I wanted to do initially was to frontload the course with a lot of social theory and philosophy. So I chose hotbed radicals that I thought would make the students all sort of boil in their seats—Kant, Pufendorf, Bentham, Locke, Demsetz, Posner, Marx (but just a little bit), and then lastly, a very little Hegel. Well, they didn't like it, and they said so loudly; the line outside the dean's office was two rows deep, but I did it anyway. I then coupled that material with issues on property-as-culture. I thought this approach was simple material that the students needed to know because it was very important to their understanding that, as our cultural expectations and social needs change, so changes a property regime. As the old regime dies, a new one crops up. Our discussion ought to be about whether or not it was a good thing to kill the old regime in light of something new. How good is the new regime; does it create more problems than it answers questions?⁴ Thereafter, we deal with the history of property. Again, this material is fairly easy. As you know, property has historical roots, and one of the cases I teach is *Dred Scott*.⁵ I thought it was important to ask, as the book does: What is the appropriate subject of property law? In connection with this case, you can also teach about life estates and remainders. There is a wonderful footnote in the textbook that deals with that: If you can divide a person up, what would it look like over time?⁶ You can also learn about the power to encroach, which is very important when you are looking at what the duties of a life tenant might be.⁷ Also, for many of us who have thought about it, we can all agree that *Dred Scott* was an important forerunner to the Chinese exclusion cases⁸ which concerned the issue of who has the right to determine what citizenship is. Good stuff for property law, I thought—well, perhaps not.

Let me give you some sense about the kinds of reactions I got from both my colleagues and my students. The first two things I will read to you are paraphrased comments I received from my col-

3. See RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* (1988).

4. See, e.g., *International News Serv. v. Associated Press*, 248 U.S. 215 (1918); *State v. Powell*, 497 So. 2d 1188 (Fla. 1986); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

5. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

6. See CHUSED, *supra* note 4, at 163 n.76.

7. See *id.* at 163.

8. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

leagues. The first comment goes as follows: "Reggie, you can't teach these students the way you were trained at Penn. These students have special needs and are not that bright." Well I could not argue with that statement because that would mean that I would have to assume that I was just like the students. Although some of the students were affluent, my roots are not very different from many of the students at Whittier.

Second, I will paraphrase a conversation I had with a colleague.

Colleague: "I really don't want to be different. If you're different you get in trouble and I'm not sticking my neck out."

My response: "So what you're saying to me is that if I'm different and if I get in trouble, you're not going to go to bat for me."

Colleague: "That's right, you're on your own."

The third example is from my student evaluations. Let me give you the context in which these students were probably thinking when they wrote these things to me—things that were quite painful. This caption runs along the top of the page. It reads: "This page is a nonconfidential page for comments, explaining your rating on the previous page or any nonconfidential comments you would like to make about the instructor for the course. This page will be available to the Faculty Personnel Committee for use in decisions affecting the instructor." Now, with that in mind, they wrote the following. One student wrote:

I don't feel that I'm learning the property laws and concepts that I will need to pass the bar, etc. We spent a lot of time discussing philosophers which don't seem to be relevant to the goals of the students. Much time in class is also spent "arguing" points, an endeavor which is needed as a lawyering skill but, perhaps, would be better confined to a class of its own.

Scary! Next evaluation:

Professor Robinson uses a book that spells "Black" with a capital "B" and "white" with a small "w," which is indicative of his general attitude of reverse discrimination. White students in this class are made to feel guilty for the injustices suffered by blacks, while black students seem to be receiving preferential treatment both inside and outside class.

I angst!

The fifth example before I get to my concluding remarks concerns a conversation with a subcommittee of our Personnel Com-

mittee. They had read these evaluations, and they wanted to find a way to help me to be much more effective in class. Their view was that if I wanted to be more “authentic” as a teacher, I must be someone who understands that the mission is doctrinal—teaching rules so that our students can be galvanized in the hard tools of legal reasoning and so that they ultimately will feel comfortable about passing the bar. They wanted to get rid of my “unauthentic” personality that was walking around the class asking ugly questions, perhaps stupid, irrelevant questions, so that students would not have to have angst about what they thought or did not think. So they told me quite up front: “Don’t teach *Dred Scott*; don’t do it.” I was flabbergasted.

I had read an article before I came to Whittier. As a new professor, you get that packet containing a lot of idealized information. You read it and say, “God, yes! I’ll be just like that.” I remember reading a little article which basically said that if a dean ever came into the class and instructed the professor on how to teach, the professor would quit on the spot and go find another job. I thought, “Yeh, that’s me!” Yeh, right! So I sat there, surprised and unable to believe it when they told me not to teach *Dred Scott*. When I asked them why, the only answer was that it will make the students feel uncomfortable. I thought: “But isn’t that precisely what I ought to be doing? Shouldn’t we make our students just a tad uncomfortable if we are going to be successful in good, effective, long-range teaching?” Answer: “No.” I didn’t listen to them—I taught it anyway.

The last comment is also taken from a student evaluation and went as follows:

I feel Professor Robinson is an excellent teacher who receives a lot of criticism which I know is based on factors outside of property. Although we are in 1991, a lot of students just can’t accept a strong, positive African-American professor who is intelligent and doing things differently. It’s sad but true that racism is alive and well at Whittier Law School.

I have used these examples, not only to foreshadow our subsequent discussions today, but also to talk about the difficulties of trying to be “authentic” and true to our teaching mission. That mission must be based, not only on the important needs of the institution, but also on the needs of the students directly in front of us and on our own academic and intellectual survival.

Today, we have a panel who will perhaps discuss the same

things I have discussed, but they will do so in different but equally compelling ways. Just as Berta Hernández left us with words asking us to think about “the indivisibility of identity,” let me just tell you how I have learned to cope with who and what I might be other than just a *black* person. I have yet to figure out exactly what that means without retreating to history and present-day social policy,⁹ or to what it means to be a *man*.¹⁰ When I walk into a room and I turn out the lights and I do not touch myself, although I do not see what it is I might be, I still live—I still exist. This continued existence means that much of what I am has nothing to do with what it is I think I see or with what other people think they see in me. Thank you.

9. See Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in “RACE,” WRITING, AND DIFFERENCE 21 (Henry Louis Gates, Jr. ed., 1986).

10. See DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 120-125 (1991).

LISA CHIYEMI IKEMOTO*

SOME TIPS ON HOW TO ENDANGER THE WHITE MALE
PRIVILEGE IN LAW TEACHING**

I. ENDANGERING

I am a Sansei woman, a third generation Japanese American woman. I was taught not to consider my identity as relevant to legal analysis. And yet my Asianness, my femaleness, and sometimes my lack of apparent (hetero)sexual orientation are relevant to those who judge my abilities to teach law or to do legal scholarship. Jerome Culp has written about a double bind he has faced as a Black law professor. White students compel him to state his curriculum vitae, to prove his right to teach a course to them. Yet Professor Culp's students also deny the credibility of the autobiographical facts that he considers relevant—that he is “the son of a poor coal miner.”¹ His colleagues deny the relevance and appropriateness of those facts.² Perhaps similarly, most of my teachers, my students, and my colleagues have denied, in various ways, the relevance and appropriateness of meanings that I attach to being a Sansei woman, a woman of color, and a member of the communities of color; at the same time, they have retained the right and the power to attach their own meanings to my race and gender.

I have been taught, more generally, that identity categories such as gender (meaning non-male), race (meaning non-white), and sexual orientation (meaning non-heterosexual) are usually irrelevant in legal analysis. The exceptions to the general rule for determining identity relevance come up in classes like constitutional law, but only for the equal protection portion of the course, employment discrimination, and any course which has the word “woman,” “gender,” “race,” “feminist,” “discrimination,” or sometimes, “critical.” I use the present tense in describing this general rule because the

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** The following version of the author's remarks has been edited and footnoted by the author.

1. Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 539, 543 (1991).

2. See *id.* at 554.

spirit, if not the letter of the general rule, still prevails as the norm. This was brought home to me very recently.

I hesitated to finish this essay because many others have written about the reasons for and the methods of teaching the significance of race, gender, class, and other social categories in law, as well as the experience of being a law teacher whose race and gender make these categories issues in the classroom.³ The points I wanted to make were very basic, and seemed to me to be redundant at best. But a colleague recently made a statement that I and others understood to suggest that teaching torts and other "non-race" courses from a critical race theory perspective would somehow endanger the students. There was, fortunately, an outraged response. Yet it seemed to me that even among the outraged, the practice of including race, particularly from a critical race theory perspective, in a "non-race" course, was desirable primarily as an alternative approach; it would be fine as long as most of us taught the "normal" way. While this view pays more respect to diversity values than a strict reading of the general rule, it leaves the spirit of the general rule intact. It preserves the power of those who claim the law is socially and politically neutral to say when and how race, gender,

3. For a short and incomplete list of helpful articles, see Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988); Patricia A. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. LEGAL EDUC. 165 (1988); Ruth Colker, *Teaching From a Feminist Perspective: An Occupational Hazard?*, 1 VA. J. SOC. POL'Y & L. 153 (1993); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989); Culp, *supra* note 1; Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 WAKE FOREST L. REV. 323 (1995); Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1 (1995); Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125 (1990); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); Margaret M. Russell, *Beginner's Resolve: An Essay on Collaboration, Clinical Innovation, and the First-Year Core Curriculum*, 1 CLINICAL L. REV. 135 (1994); Peter M. Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033 (1990); Gerald Torres, *Teaching and Writing: Curriculum Reform as an Exercise in Critical Education*, 10 NOVA L.J. 867 (1986); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988); Donna E. Young, *Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching*, 11 BERKELEY WOMEN'S L.J. 270 (1996).

and other social categories are relevant in the classroom and in the law.

At the First Northeastern People of Color Legal Scholarship Conference, we talked about how to teach race in courses that do not fit into the general rule. In other words, we talked about how to show the relevance of race in the formation and application of legal rules that are not about race in any way that is obvious. In our discussion, we assumed without saying so that race is not obvious in most legal rules and in most law courses because white privilege is the implicit, invisible norm.⁴ It is the norm built into the rules. And it is the norm built into the perspective we think of as the normal way of teaching. I state this point now because I am writing for a broader audience than the one attending the Conference. I also want to say that it was refreshing not to have to justify the need for the discussion; it was restful to be able to assume that we shared certain conclusions. The lack of need to justify and the ability to assume some shared perspective is part of what makes those who embrace the general rule privileged in law and law teaching. It is part of what privileges whiteness in law and law teaching. I believe that when we reach the point that teaching race, gender, sexual orientation, class, and disability does not need to be justified, is not considered alternative, and is valued for the meanings attached by those not privileged by these categories, then we will be endangering privilege itself.

II. BASICS

Making race and other points of marginalization visible in a law course is a lot of work. Take the reading materials, for example. A few textbooks now include materials that address race, gender, sexual orientation, class, and disability. For example, I use Singer's text, *Property Law: Rules, Policies, and Practices*,⁵ in my property course. I have used course materials that do not make race and other categories explicit. In those courses, I have tried to use classroom discussion to raise questions about how race might have operated in a case, how gender norms shaped the formulation of a rule, and so on. I might try to bring in facts that the judge, the casebook author, or the rule edited out, and ask why those facts

4. See generally STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

5. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (1993).

about race were edited out. But in those courses, it feels, and undoubtedly appears, that I am at odds with the materials. More importantly, the fact that I am at odds with the materials is likely to appear as if I am imposing my personal views onto neutral materials. In other words, the reading materials, and the fact that most of my colleagues are teaching that race is invisible, enables the students to attach their own meaning to my identity. Reading materials that raise the same questions I do legitimize my efforts to address these questions. And in the best moments, the race of each of us in the classroom becomes obviously valid.

I often put together my own course materials. Obviously, this takes a great deal of time. It takes more time to compile readings that expressly address race, gender, sexual orientation, and class than it does to compile readings that express the "law-is-neutral" approach. There are few published texts to use as models. You have to critically evaluate the standard approaches to the course, and rethink the topic in order to figure out how to make the social issues apparently relevant.⁶ In addition, you have to do extra research to identify and locate readings that accomplish those teaching goals. I say "extra research" because contextualizing the course subject in a way that makes the social categories obvious often means taking an interdisciplinary approach. As a practical matter, that means cramming in a bit of history, sociological method, science, and other areas. I believe that this extra work has enhanced my teaching and scholarship. But the fact that it takes so much additional effort to add context and use an interdisciplinary approach indicates how pervasive and deeply engrained acontextual, separatist analysis is at law.

This work has costs. For example, the time it takes to rethink the topic and put the reading materials together might be spent writing articles that would get more credit at promotion and tenure time, or perhaps, better salary increases. Teaching from an "alternative" perspective often has political costs. My guess is that teaching from an "alternative" perspective can reinforce the authority of those who teach the so-called "normal" way. Or the fact that you

6. Of course, it is a good idea to start by contacting others who might be teaching the same course using a similar approach. Sharing ideas, reading lists, and syllabi saves a lot of time. I recently found a very good article by Karen Rothenberg, someone I know, about teaching bioethics from a feminist perspective. Had I talked with her earlier, I could have saved myself time and benefitted from her wisdom. See Karen H. Rothenberg, *New Perspectives for Teaching and Scholarship: The Role of Gender in Law and Health Care*, 54 MD. L. REV. 473 (1995).

are teaching that race and gender are relevant may be perceived as threatening to the authority of others, as well as to the authority of majority viewpoints. This can negatively affect both teaching evaluations and relations with some students and colleagues. You may have to use political capital to defend your teaching. Or you may simply lose your political capital.

Finally, this work takes a lot of emotional energy. As I have indicated, your identity becomes an openly acceptable site of contestation. The identities of everyone in the classroom, but particularly the identities of those marked different by our social categories, become sites of contestation. Talking about race, gender, sexual orientation, class, and disability makes everyone uncomfortable. Some react negatively and even harmfully to this discomfort. And it is, in my experience, easier to do this work badly than it is to do it well. I do not think that I have ever quite succeeded in doing this work well; I have had a few good moments, a lot of ineffective moments, and too many bad moments.

So why do I do this work? My personal reasons are fairly simple and straightforward. One reason is accuracy. Showing that race, gender, and other social norms shape the formation and operation of law is descriptively accurate. That my colleagues and students may disagree with me at least raises the possibility that one's understanding of how the legal system operates has political content and is shaped by personal perspective and experience. A second reason is closely linked to the first that I mentioned. I hope that some students will embrace a critical viewpoint and continue to question the normative content and effect of the law in their other classes and in their careers. A third very important reason for doing this work is to provide space and validation for those students who already have a critical consciousness and feel marginalized in their other classes because of that, and for those students of color, women, gay men, and lesbians who experience the hostility and silencing of the white heteropatriarchal culture that operates in most classrooms. Finally, I am trying to create space for myself within the law school.

The "how to" part of my discussion is very basic. As I mentioned, others have articulated both reasons for and methods of making social norms visible in law. Certainly, there is a great deal more to write about why and how we can teach law in the context of social reality as experienced by those marginalized by it. But I want to address a few "how to" points that are so basic, they seldom

show up in print. To be as concrete as possible, I will use examples from my bioethics course.

A. *Selecting Reading Materials*

As I compile the reading materials for this course, I try to include materials that describe and use the dominant bioethics analytical framework, which is premised on liberal individualism, and materials that critique that framework. For the latter, I use readings to provide contextual information that raise questions about assumptions within the dominant approach, and I use readings that do critical analysis. For example, the first set of readings examine the doctrine of informed consent. In that group of readings, I include a few standard cases to describe the legal doctrine, a study that compares European-Americans, African-Americans, Mexican-Americans, and Korean-Americans, and shows that cultural and racial differences among these groups mediate understandings of autonomy and methods of medical decisionmaking.⁷ I also include an excerpt from the President's Commission report on health care decisions that documents how the same medical information carries different weight with patients depending on how it was presented,⁸ and excerpts from Sue Fisher's book, *In the Patient's Best Interest*, a linguistic study that reveals the effects of gender, class, education, and expertise in structuring obstetrics/gynecology doctor-patient relations.⁹

During classroom time, I try to use these materials to discuss whether, and how, the legal concept of autonomy that premises informed consent might be gendered and ethnocentric in construction and application. I also discuss how race, gender, class, education levels, the physical setting (typically it is a clinic, hospital, or doctor's offices, the doctor's domain), and the use of language can structure doctor-patient relations. I refer to Sue Fisher's concept of the contextual web, and we draw the web on the chalkboard as a group exercise. I often tell about how I experienced a cervical can-

7. See Leslie J. Blackhall et al., *Ethnicity and Attitudes Toward Patient Autonomy*, 274 JAMA 820 (1995); see also Barbara A. Koenig & Jan Gates-Williams, *Understanding Cultural Difference in Caring for Dying Patients*, 163 W.J. MED. 244 (1995).

8. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP, vol. III (Oct. 1982); see also Sara Fritz, *Patients Seldom Pick Their Treatment, Professor Finds*, L.A. TIMES, Dec. 15, 1993, at A29.

9. See SUE FISHER, *IN THE PATIENT'S BEST INTEREST* (1990).

cer scare that I had as a result of a positive pap smear, and the conversations I had with my doctor about the diagnosis and treatment process that followed. I try to talk about how my race and gender and that of the doctor (white, male) mediated these events, so that the links between my personal story and readings become obvious. I use the account to try to demonstrate the relevance of personal experience and how personal narrative can be used as an analytical tool. I try to encourage students to use their experience as more than an anecdote, but at the same time, I try not to pressure them to reveal personal information.

During our panel discussion, Professor Robinson suggested front-loading the readings with a group of theory materials. This is an effective approach, but currently I take a different approach. I mix the readings on theory throughout the course materials. I take this approach in part to show that theory, context, and legal doctrine are not separate categories of legal work. I also do this because it makes the theory less intimidating and more digestible for those students who resist theoretical analysis. In addition, I simply find it difficult to discuss the theory without the contextual materials.

B. *Selecting Students*

I am less interested in having students who have a pre-existing interest in the subject matter of the course than in having students who are willing to engage in conversation about how racism, for example, might or might not operate in the legal rules we are studying, without being obstructive or oppressive. I do not (and cannot) directly select the students enrolled in the courses I teach. I do try to start the semester in a way that accomplishes two things. I try to make it clear that we will be engaging in critical inquiry that addresses how race, gender, class and other social categories operate at law. I review the course syllabus and open a substantive discussion during the first class so that this approach is on the table at the outset. In this way, I hope to encourage those students who are resistant to critical thinking to either open their minds or drop the course.

In bioethics, I have taken two different tacks in choosing an opening discussion. As mentioned, I usually begin the course with the informed consent materials. Since the students are already familiar with the doctrine and have had personal experience as patients, the topic is easy to broach. In other semesters, I use material

that makes many students uncomfortable. I might use a topic that is unfamiliar or sensitive. Or, as discussed below, I have used Mary Shelley's *Frankenstein*.¹⁰ While most students are familiar with the story, they are unaccustomed to using a literary text in law school. There may be some students who think this is simply too strange, too unsettling, too non-doctrinal for them. If they are not willing to be unsettled, I hope they drop the course.

I try to set a tone for open, critical, and constructive engagement, but at the same time, I also try to make it clear that we are not going to discuss whether racism, patriarchy, heterosexism, and other systems of subordination exist. I try to convey that we can talk about how racism expresses itself, how it harms or privileges individuals, groups, and ourselves, and whether racism is operating in a particular situation. Hopefully, this starting point weeds out hostile students.¹¹

If your goal is to speak to the unconverted, then you may not want to take this approach. You may want to target those students who are consciously or unconsciously hostile to inquiry that questions the assumption of legal neutrality, either for the purpose of raising their consciousness or for the purpose of using them as foils. As I mentioned, my priority reason for doing this work in the classroom is to provide a space for students marginalized in other areas of legal education. I do not try to provide a space with no opposition, just one with smaller margins.

C. *Exposing Norms*

I try to start each of my courses with a discussion that exposes how consistently and unconsciously we bring social norms to bear in analytical thinking. My initial goal is to begin a conversation in which we learn how to recognize and articulate the operation of these norms. My larger goal is to prompt students to think about how legislators, judges, lawyers, and we ourselves create and apply law with normative content. I start with simple examples. In bioethics, I often use Mary Shelley's *Frankenstein* as a text for beginning this discussion. As a preface to the discussion, I tell the students that many regard *Frankenstein* as the first story, or the

10. MARY SHELLEY, *FRANKENSTEIN OR, THE MODERN PROMETHEUS* (Maurice Hindle ed., Penguin Books 1985) (1818). I usually assign the introduction, written by Maurice Hindle, as well as the story.

11. In the worst case scenario, a hostile student may decide to remain in the course for the purpose of actively obstructing critical inquiry.

genesis, if you will, of the science fiction genre. I provide a bit of background information about Mary Shelley and the romantic era in which she wrote. I then ask the students to break into small groups to discuss a series of questions: How are “science,” “nature,” “scientist,” “law,” “human,” “civilization,” “man,” and “woman” portrayed in the novel? We then regroup as a class to report and further discuss the questions. In the context of the novel, the students seem to have no trouble identifying and addressing the normative content of the concepts I have asked about. During the large group discussion, comparisons to contemporary understandings of these concepts inevitably arise. In the best conversations, we are able to begin raising questions that suggest ways in which scientific knowledge is socially constructed.

The story of *Frankenstein* works particularly well to identify ways in which patriarchy and racism affect social relations. For example, while the humans in the story are white and for the most part Swiss, the creature is clearly an outsider. Students are usually able to identify racist norms in how Mary Shelley depicts the creature; she consistently describes him as “dark.” The female characters are mostly morally good, hyperfeminized according to contemporary standards, and lack depth relative to the key male characters in the story. These points can be used to raise questions of how race and gender affect our understanding of what it means to be “human.”

I tell the students the reasons I use *Frankenstein* as a text. *Frankenstein* is often used as a metaphor in public discussions about science and medicine. I want the students to feel free to use such metaphors, to use popular culture in class, but to do so in a way that evaluates their role and identifies their normative content. I ask the students to think about the role of stories in ethical, policy, and legal analysis, and I ask them to identify other writings that might serve as texts for bioethics. I also ask the students to consider this question in the context of a bioethical dilemma they are probably already familiar with, such as surrogacy. I try to surface stories about mothers, fathers, family, and the lines between natural and artificial that have been embedded in both the public debate and the legal analysis of surrogacy. While this might sound clear and coherent in print, typically the classroom discussion is very unstructured and confusing to some. My hope is that the substance and the structure (or lack thereof) of the discussion will loosen up preconceptions about law and medicine, ethics, analysis, and the social relations embedded in each of these concepts.

CONCLUSION

I think it is probably clear that how I teach springs directly from who I am—a Sansei woman, a woman of color, a member of the communities of color. I have not always taught this way. Nor does my experience of racism, heteropatriarchy, and economic injustice inform every aspect of my world view or my teaching. In many respects it is easier to teach a doctrinal, liberal realism perspective only; that perspective is acceptable and familiar and therefore, safer and easier. Teaching critical inquiry can be controversial and emotionally exhausting. I am always trying to overcome fear of causing controversy, insecurity about the effectiveness of my teaching methods, and a desire to take the less strenuous route (i.e., basic laziness). But I tell myself that if everyone likes what you are doing as a teacher, you are either doing something wrong or the world has changed, and right now, the former is more likely.

DOROTHY A. BROWN*

SPLIT PERSONALITIES: TAX LAW AND CRITICAL RACE THEORY**

The following is a mythical conversation:

[FOURTH WHITE COLLEAGUE]: *I don't think that there can be a black legal income tax law or a black economics separate from white economics. Should blacks have additional deductions to take account of racism? Or should there be a longer period for blacks to file their returns because many of their ancestors were slaves?*

[JEROME CULP]: *I don't know if blacks should have more deductions than whites, I haven't made a detailed study of how the income laws impact blacks.*

[FOURTH WHITE COLLEAGUE]: *Not enough is known. Certainly, we could help to do more and better studies on blacks and income taxes, but I take it that is not Black Legal Scholarship.*

[SECOND WHITE COLLEAGUE]: *There aren't very many blacks who teach tax law or do research in that area. Is that part of your point?*

[JEROME CULP]: *Yes. But my point is more complex. My tax colleagues have stated these arguments in their most negative terms. There may be a [sic] income tax problem that would benefit from being viewed in a black perspective, but until you look, how will anyone know? To what extent have our tax laws been distorted now and historically by the question of slavery and continuing racism?*¹

Although the above conversation never took place, it had a profound impact on my thinking. When I read Professor Jerome Culp's challenge,² I knew that it was one which I had to accept.

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** The following version of the author's remarks has been edited and footnoted by the author.

1. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 101. The quoted material is "[a] mythical conversation in Duke Law School Faculty Lounge shortly after *Toward a Black Legal Scholarship* was completed and circulated." *Id.* at 99.

2. See *id.* at 105 ("everyone has to do black scholarship if it is to succeed").

Ever since that day, I have dedicated myself to exploring issues of race and ethnic origin in my tax courses and scholarship. The focus of this speech will be federal income taxation, or the tax treatment of individuals. More specifically, this speech will focus on both the marriage penalty paid and the marriage bonus received by married couples.

I have been thinking about these issues since 1991, yet I have just begun to write about them. That is a function of the classes that I have taught over my brief five years in the legal academy. I taught Partnership Tax for three years and was unable to unmask the racial and ethnic issues in that course. I taught Deferred Compensation once and didn't really attempt to unmask those issues, since my scholarship interests lie elsewhere. It wasn't until the fall of 1994 when I began teaching the courses I wanted to teach, namely Tax Policy and Federal Income Taxation, that I put on my "race lenses," as Professor James Hackney has described it, and went looking to unmask the racial implications of the federal income tax system.

Unmasking racial and ethnic issues in the federal tax laws is a difficult and arduous task. Very few scholars have attempted to publish in this area.³ I understand why that phenomenon has occurred. First, tax law has a myth about it that suggests that it is different than other areas of the law.⁴ My tax colleague at Cincinnati, Professor Paul Caron, has eloquently referred to this phenomenon as "tax myopia," and observed that there are "serious consequences caused by the . . . myth that tax law is somehow *different* from other areas of the law."⁵ One such consequence is per-

3. But see Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45, 45-57 (Karen B. Brown & Mary Louise Fellows eds., 1996) (discussing the differences between black and white households concerning their payment of the marriage penalty or their receipt of the marriage bonus); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (discussing the differences between black and white households concerning the tax treatment of wealth); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (acknowledging the differences between black and white women that previously have been ignored by tax scholars).

4. See Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994).

5. *Id.* at 518. See also Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 637 (1996) (Wherein author observes: "I previously have criticized what I call 'tax myopia'—the tendency of the tax law to view itself as an isolated body of law separate from other areas of law." (footnote omitted)). Additional authors have also observed the tax myopia phenomenon. See, e.g., Lily Kahng, *Fiction in Tax*, in TAXING

petuating the myth that tax law is neutral and objective. To the extent that tax law is assumed to be different, it is not examined the way other areas of the law have been examined through racial and ethnic lenses.⁶ To the extent that tax law is assumed to be different, any disparate impact based upon race or ethnicity will continue unabated. My scholarship is dedicated to forever eradicating the belief that tax law is somehow different, that it has no differing impact based upon race, ethnicity, or any other characteristic.⁷

Taxation is the result of a body of law including congressional statutes, the Internal Revenue Code of 1986, as amended (the "Code"), interpretive agency pronouncements, and judicial decision-making.⁸ Given that description, it is no surprise that tax laws will have differing impacts based upon race, gender, and other defining characteristics. Knowing that race matters and proving that race matters, however, are separate endeavors.

In order to unmask how race operates in the tax laws, I had to begin outside of the federal tax laws. I have consulted historical, political, and sociological materials, to name a few. I have become relentless in the pursuit of information. I find myself talking to complete strangers on airplanes the minute I find out that they are involved in one of the above-mentioned areas. I have found obtaining information in those areas just as difficult as it has been unmasking the racism that operates in the tax laws.

I believe that there is an important story to tell, just with respect to the difficulty of obtaining information. For example, the Internal Revenue Service does not keep tax return data by race.⁹ I am not suggesting that it is a good idea for revenue agents to know the racial or ethnic identity of a taxpayer when deciding when to

AMERICA, *supra* note 3, at 25, 26 (Stating that "tax fictions can be dangerous. They can mask underlying motives and biases and they can cause unforeseen harms.").

6. See, e.g., Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

7. Legal scholarship exists on the relationship between sexual orientation and tax law. See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991).

8. See JOSEPH M. DODGE ET AL., *FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY* 6-14 (1995).

9. Telephone Interview with John Kaminsky, IRS Statistics Branch (Nov. 8, 1996) (stating that the IRS does not ask for any racial identity information).

audit that taxpayer. What I am saying is that if I cannot uncover data as to who pays taxes by racial and ethnic identity, I will never be able to rise to Professor Culp's earlier challenge. The good news is that the Census Bureau collects more data than you will probably ever have time to analyze. It is that data base and an angel in the form of Mark Carozza, who works at the Institute for Policy Research at the University of Cincinnati, that have enabled me to do the preliminary work that I have done.

The United States Census Bureau collects household information data by race and ethnic identity. The Bureau's individual records are available in the Public Use Micro-Data Sample. As I state in my forthcoming book chapter entitled *The Marriage Bonus/Penalty in Black and White*, I found that black couples are more likely to pay a marriage penalty and white couples are more likely to receive a marriage bonus.¹⁰ The marriage bonus/penalty analysis is a result of the convergence of three different factors, namely: how the Code is written and interpreted; the employment discrimination experienced by black workers and white women in the labor market; and the differing marriage rates of black and white women. Let us examine each in turn.

First, the tax laws. The disparate impact of the marriage bonus/penalty is attributable to three tax principles. The Code allows married couples to file joint returns.¹¹ Husbands and wives can allocate up to one-half of their income to a non-working spouse and have that assigned income taxed at a rate lower than if that spouse were single.¹² That lower tax liability is referred to herein as a marriage bonus. The Code rewards those families whose income is earned by only one spouse.

Alternatively, if husbands and wives both work, and earn roughly equal amounts, they will pay taxes as a couple that is considerably higher than those they would pay as single adults.¹³ That higher tax liability is referred to herein as the marriage penalty. The Code penalizes those families with two wage earners. I would note that for purposes of the Code, who is married and eligible to

10. See Brown, *supra* note 3, at 45. Although a more complete analysis would take into account racial and ethnic differences affecting Hispanic-American, Asian-American, and Native-American families, the book chapter was a preliminary step in that direction.

11. See I.R.C. § 1(a) (1994). Joint returns are not mandatory and the alternative of filing "married filing separately" is available.

12. See DODGE ET AL., *supra* note 8, at 138.

13. See *id.* at 139.

file a joint return is determined by reference to state law.¹⁴ That makes same-sex and opposite-sex couples only eligible for joint filing status if recognized as married under state or local law.

The second tax principle that is a factor in this analysis is that the Code taxes income at progressive rates. As a result, the marriage penalty is the highest on the two-income family that earns roughly equal amounts of income.¹⁵ The second wage earner's first dollar of income is added on top of the spouse's salary and taxed at the spouse's highest marginal tax rate. The second wage earner does not receive the benefit of the lower tax rate that was applied to the spouse's first dollar of wage income. Progressive tax rates penalize the second wage earner. Alternatively, to the extent that there is only one wage earner in the household, progressive tax rates coupled with the joint tax return provisions afford that household a marriage bonus.

The third tax principle is that the judiciary allows the value of services, such as child care, provided by family members to the household to go untaxed.¹⁶ As a result, those three principles result in marriage tax penalties and marriage bonuses. A married couple can pay a higher tax when they marry or receive a reduced tax liability when they marry. The Code is not marriage neutral, and as previously mentioned, my research indicates that the marriage penalty couple is more likely to be black, and the marriage bonus couple is more likely to be white. This is not because the Code explicitly limits its penalties to blacks and bonuses to whites, but because the Code operates in the context of larger societal issues. I will next address those larger societal issues, namely employment discrimination and differing marriage rates.

I will focus on two aspects of employment discrimination, specifically, wage discrimination and differing labor participation rates. First, "[f]or every dollar earned by a white man, a white woman earned 78¢, a black man earned 74.8¢, and a black woman earned 66¢."¹⁷ Second, the labor force participation rates of married women differ according to race. In 1990, "73 percent of married black

14. See 4 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 111.3.6 (1992); Cain, *supra* note 7, at 97; Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 792-95 (1989).

15. See John Brozovsky & A.J. Cataldo II, *A Historical Analysis of the "Marriage Tax Penalty"*, 21 ACCT. HISTORIANS J. 163, 166 (1994).

16. See, e.g., Staudt, *supra* note 3, at 1576.

17. Brown, *supra* note 3, at 52 (footnotes omitted).

women were in the waged labor force, compared to 64 percent for married white women."¹⁸ The labor force participation rates for men have declined over the past twenty years, but this decline has been greater for black men than for white men.¹⁹

Finally, we observe differing marriage rates. Thirty-six percent of black women and sixty-eight percent of white women were in married-couple households in 1990.²⁰ Assuming that taxes affect behavior, including the decision to marry,²¹ could the tax laws be operating in a way that discourages black women from marrying and encourages white women to marry? Additional empirical work needs to be done, but I suggest that it will yield some fruitful results.

Now we are ready to examine how the convergence of the tax principles, employment discrimination, and differing marital rates result in black couples being more likely to pay a higher marriage penalty and white couples being more likely to receive a marriage bonus. As a result of wage discrimination, black men and women earn wages closer in amounts than white men and women. This assumes, however, that black men marry black women and white men marry white women. Given that interracial marriages are still rare, this is a safe assumption.²² In addition, more black married women are in the labor force. Accordingly, black couples are more likely to have household income split roughly equal. Given that the greatest marriage penalty exists in households where two wage earner couples earn equal amounts, married black couples, with a higher percentage of two wage earners, with salaries closer than white couples, are more likely to pay a marriage penalty than white couples.

Yet an additional factor in the analysis is that most black wo-

18. *Id.* at 49.

19. *See id.* at 51. The decline in labor participation rates for younger, white men has been attributed to advanced educational opportunities. *See* BETTE WOODY, *BLACK WOMEN IN THE WORKPLACE: IMPACTS OF STRUCTURAL CHANGE IN THE ECONOMY* 147 (1992).

20. *See* Reynolds Farley, *The Common Destiny of Blacks and Whites: Observations about the Social and Economic Status of the Races*, in *RACE IN AMERICA* 197, 212 (Herbert Hill & James E. Jones, Jr. eds., 1993).

21. *See* James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?*, 48 NAT'L TAX J. 565, 571 (1995) (finding that "the probability of marriage falls as the marriage tax increases").

22. *See* Robert G. Wood, *Marriage Rates and Marriageable Men: A Test of the Wilson Hypothesis*, 30 J. HUM. RESOURCES 163, 172 (1995) (reporting that "in 1985, 98.9 percent of black married women and 96.6 percent of black married men had a black spouse").

men are not married, and most white women are married. Therefore, most black women receive neither the marriage penalty nor the marriage bonus. Recall the question I posed earlier: Does the Code play a role in the marriage decision? As heads-of-households, black women are disproportionately poor.²³ Eighty percent of families headed by black women were in poverty, while fifty-five percent of families headed by white women were in poverty.²⁴

White men and women earn wages further apart in amounts. Therefore, even if they pay a marriage penalty, it will not be nearly as great as black couples. Given that 74.8¢ is closer to 66¢ than 78¢ is closer to one dollar, black couples are more likely to pay a higher marriage penalty than white couples.

Is it just a coincidence that the most penalized married couple would be that of a black man and a white woman? Seventy-eight cents is even closer to 74.8¢ than those wages of a black married couple. In that household, however, white women would make more than their black male husbands.

As a result of wage discrimination, white males earn the highest salaries. One dollar can buy more than the 74.8¢ black men can earn. White men can more economically afford to provide for their families based upon their salaries alone. Accordingly, white wives do not have to work for the family to survive economically, and if they do work, they will receive less wages, again a result of employment discrimination. Those two instances of discrimination, coupled with the exclusion from taxable income of the value of the services that wives provide for the family, provide incentives for white women to work inside the home, and for the family to receive a marriage bonus.²⁵ As noted earlier, we observe that married white women are not in the labor force to as great an extent as married black women.

Although far more research needs to be done, it seems clear that the Code has a different impact on black and white households where both marriage penalties and marriage bonuses are analyzed. Although the Code did not cause the societal racism that results in employment discrimination and differing marriage rates, the Code is operating to exacerbate that racism by penalizing black couples and benefitting white couples. Accordingly, the Code's role in reinforcing societal racism must be challenged and eliminated.

23. See Farley, *supra* note 20, at 213-17.

24. See *id.*

25. See Brown, *supra* note 3, at 53.

I will conclude with a brief discussion of how I teach sensitive issues involving racial and ethnic identity. First, I have only recently begun to explore issues of race and tax law, and anticipate incorporating some of these ideas in my Tax Policy course this Fall. What I have always done in Tax Policy that has met with the most resistance, however, is to critique the print media. I generally find newspaper clippings on relevant tax topics, and proceed to rip apart the newspaper articles in class. I encourage the students to do the same. What I have observed is that those who agree with the *Wall Street Journal* don't like it when I rip the *Journal's* views apart, and those who agree with the *New York Times* don't like it when I rip apart the *Times's* views. Yet, by the time the semester is complete, I find less resistance, given that I am an equal opportunity criticizer. I manage to annoy all of my students. That's when I know that I have had a good semester. As an aside, I also know whether I have had a good semester outside of the classroom by counting the number of colleagues that I have managed to annoy. In the five years that I have spent in the legal academy, I have had an extraordinary number of good semesters both inside and outside of class.

In my State and Local Finance course, which I have taught for five years, I spend a few weeks carefully examining education funding cases. Those cases involve issues of race and ethnicity, taxes and education—a fairly volatile mix. So it is important that I set a respectful tone early in the semester, which I do by inviting student's views, but challenging them to unmask their underlying assumptions—but doing so with the utmost respect for those assumptions. I find students are as respectful to you as you are to them.

In the early part of the State and Local Finance course, we don't touch upon racially sensitive matters, but we do touch upon politically sensitive matters—which are often just as volatile. At the first class, we discuss which branch of government the student's fear the most: the federal, state, local, or judiciary. When students respond (and they do respond) I seek to get them to understand that their colleagues' views are just as important, and just as biased as their own. The biases come out slowly, but they come out. I usually unmask the biases by challenging their underlying beliefs. I ask, "What is your cite for that proposition?" When they concede that they have no cite, but that it is based upon personal observations, that is an important moment in class. I ask them if they can understand how that might not be persuasive to those with different

experiences, different personal observations. How will you reach them? What if those with different experiences are the judges considering your client's case? How can you best represent your client given the judiciary's bias? Of course, this assumes that we spend a good part of the semester critically evaluating the court's decisions.

Students react in a variety of ways to the process, however. They tend to be rather cynical by the time I get them and actually enjoy shooting at judicial decisions. They tend to like this exercise less when the judge has the same bias that they have, although rarely do they see it as a bias until a colleague points it out in the class discussion. They usually resist. I don't try to change their minds. I just ask, "Do you see how your belief is formed upon an assumption that others may not share? That if you continue to make arguments based upon that unshared assumption you may lose your audience?" That is the most that I can hope for. I have however, had the gratifying experience of having my students come to me after the semester is over and say that I made them think about things they never thought about. It is such moments that make this process worthwhile.

To summarize, I recommend putting your race lenses on, relentlessly exposing the disparate impact that your intuition tells you is there in whatever subject you teach, and surrounding yourselves with scholars that are supportive of your work. Thank you and happy hunting.

CARLOS CUEVAS*

My name is Carlos Cuevas and I teach at New York Law School. Before I begin my comments, I would like to thank Professor Leonard Baynes and Western New England College School of Law for hosting this Conference and my colleagues for letting me participate in this interesting panel.

I teach Article 9, which encompasses secured transactions, bankruptcy, and corporate reorganization. The first time I taught the bankruptcy course, it was during the day and I had approximately 50 students. For the last three years my bankruptcy course has been basically sold out. My average day enrollments have been 110 for bankruptcy and secured transactions, which are both electives at my school. I also teach a seminar in corporate reorganization which has an enrollment of 25 people.

I start the beginning of each course by writing a phrase on the board: *THE PURSUIT OF EXCELLENCE*. The reason I put that phrase on the board is to let the students know that I am there because I want to be there. I take my job very seriously and the same expectations the students have of me, I have of them. We are in a special profession. Although you may not think that you deal with life and death, at some point in time you will. Therefore, you have to learn how to do the smallest task, as well as the most important task, to the best of your ability. This point deals subliminally with the competency issue. From the moment I get to the classroom, I want the students to know that I take my job very seriously and that I am not the so-called "token" on the faculty.

I also deal with teaching materials differently. You see, unlike property law, for which a text that dates from 1940 would for the most part be basically modern, the areas of the law in which I teach evolve rapidly. I revise my course materials for corporate reorganization and for bankruptcy every six months because the law in these areas basically evolves every six months. I want students to know that I am teaching them what is current.

The other thing that I try to do in the classroom is to set a tenor that encourages dialogue, and to engage students in that dialogue. The first time I taught corporate reorganization, there was one person of color in the classroom. Now, my average enrollment of people of color is between 20 to 25 percent. I think that one of

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the reasons I have been successful is that I call on people. I do not want there to be silent voices in the classroom. I want the students to know that they have paid their money just like everyone else and they are entitled to a decent education, and to the best education I can give them. For example, I use the Socratic and hypothetical methods of instruction. When I get a good student of color or a good woman student, I ask them to play the role of judge. I want these students to know that they do not have to play a subservient role; that no one in my class has to play a subservient role. I want them to know that not only in my class, but in life, they can become a judge like Judge Johnson, and that they too can ascend in the legal profession.

The question is: What are you doing in your classroom to break down the myths, not only of society in general, but also of academia? Just to give you an example: The wife of one of my former research assistants is attending another law school, and he explained to me that she feels very frustrated because she raises her hand in class but is never called on. That is the worst thing you can do because you are saying, "this person does not exist." Well, we all exist, and we all have something to contribute. My students of color who are not on law review could end up working for legal services where they may be plaintiff's counsel in a class action. They all have something to contribute and they all have something to give.

I think that the fact that I can teach commercial courses and have a high enrollment is very important because he or she who controls the money in this society controls a lot. If you do not control your own money, then it is questionable whether you are really empowered in this society. Therefore, I would like to think that my course, in addressing commercial financing, is linked to empowerment. I am from New York and I know that my colleague Ms. Brown is also from New York. There are a lot of black, Latino and Asian small businesses in New York. Well, is it not time that we started servicing this community so that it can have access to attorneys who are competent and are sensitive to its issues?

You see, I generally view myself as a mentor to my students. My goal is to help them develop into good attorneys, to start engaging them in the dialogue, and to show them that we are not only engaged in an academic experience but also in a lifelong experience of development. If someone says something that is really incorrect, but they are acting in good faith, I will say, "Well, would you really say that to a judge? Would you really say that in that manner?" I

do this because I want my students to know that in a couple of months they will be getting paid for this and that when they make mistakes, it is not going to be a matter of getting an *A* or a *B* in my course. Litigation is a zero sum game, either you win or you lose, unless you settle.

I do not raise the topic of race in class because, as Ms. Brown said, no one files a statistical check concerning race or ethnicity when you file a bankruptcy petition. You really would not want that because you would not want a judge to have access to that type of information. But the one thing I can discuss is the issue of class, and the reasons certain rules are made. One of the things that I bring to the discussion is public choice theory. Public choice theory discusses who makes the rules and why those rules are made. It discusses the nature of the legislative process because, after all, the voluminous statutes I deal with do not appear in the United States Code accidentally. They appear there because they perpetuate certain classes and certain economic groups. One of the things I try to say to my students is, "Imagine you are in a fictional country and you are making rules for commercial law. How would you make those particular rules and who would want them?" This exercise prompts the students to think about class and class structure.

The one thing I try to do, and I think this is more important outside the classroom, is to explore the possibilities. I try to tell people, "if you have a dream, pursue that dream," because I want students to know that they do not have to settle for mediocrity. They can put their best foot forward and eventually they can become judges, United States Attorneys, and they can also clerk. I think one of the problems is that there are not enough minority law students who become clerks, even though they have the capability. So, I try to be a mentor to them, and to encourage their aspirations.

There is a point that Ms. Brown and I both talked about: We have a schizophrenic identity because we are people of color, yet we teach in the business area. If I have one area of resentment it is that I do not want to be told how to think about certain issues. Let me be an individual and respect me as an individual. That is why I am in the academy. You can only tell me what to think if you have hired me as your attorney and I am your advocate. In that circumstance I breach my fiduciary duty to you if I take an opposing position. The reason I have become an academic is that I am able to have academic freedom to engage in serious intellectual discussion. I think that we, as people of color, are in a bind at times because we are told that we cannot take a certain position because it may not

be the "liberal" position. The real question is, what is the intellectually correct position? The same issue arises with respect to academic support of people of color on law school faculties. Sometimes you are the "Lone Ranger," but the question is whether you want to be the "Lone Ranger" or sacrifice your soul? That dilemma is something that we face all the time, and that is why conferences like this are so important. Here, we have the ability to garner the support of our colleagues and discuss these issues in a free manner. I thank you for this opportunity, and I thank you for listening to me.

ROBERT P. WASSON, JR.*

INTRODUCTORY COMMENTS BY PANELIST ROBERT P.
WASSON, JR., ON SPLIT PERSONALITIES:
TEACHING AND SCHOLARSHIP IN
NON-STEREOTYPICAL AREAS
OF THE LAW**

Good morning. My name is Bob Wasson, and I would like to thank the organizers of the First Annual Northeastern People of Color Legal Scholarship Conference for inviting me to serve as a panelist on "Split Personalities: Teaching and Scholarship in Non-Stereotypical Areas of the Law." To that end, I have been asked to make some introductory remarks.

Like the topic for our discussion, I, too, share a split legal personality, with one side of that personality in "stereotypical" areas of the law and the other in "non-stereotypical" areas of the law. The "stereotypical" aspect of my legal personality is reflected in the fact that I share the "stereotypical" background of law school teachers by having graduated from Harvard Law School.¹ I wanted to be a litigator and clerked as a summer associate at two "stereotypical" large corporate law firms: Kirkland & Ellis in Chicago² and Willkie, Farr & Gallagher in New York. My "stereotypical" experience con-

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** The following version of the author's remarks has been edited and footnoted by the author.

1. See Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 227 (1991) (reporting that during the 1988-89 academic year, 13.0% of all law school faculty had graduated from Harvard); *id.* at 194 & n.19 ("Five of the nation's 175 law schools [Harvard, Yale, Columbia, Chicago, and Michigan] graduated nearly one-third of all law professors teaching today."); Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 507 (finding that 13.9% of all law professors teaching during the 1975-76 school year had graduated from Harvard Law School); Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2323 (1992) ("More than one sixth of the [minority] men (15.8%) and women (15.9%) graduated from Harvard Law School, the largest supplier of law school faculty members in the country."). Merritt and Reskin report that their findings were remarkably consistent with these earlier studies. In their full population, including both minority and white professors, 13.3% of the faculty members had graduated from Harvard. See *id.* at 2323 n.95.

2. At the time I clerked at Kirkland, during the summer of 1977, it was reported to be the sixth largest law firm in the country with 160 attorneys between its Chicago and Washington, D.C. offices.

tinued upon graduation from law school by working as a litigation associate at Reuben & Proctor in Chicago, a spin-off of Kirkland & Ellis, and later, at another large corporate law firm, Goodwin, Procter & Hoar in Boston, my home town.³ When I arrived at Suffolk, I was asked to teach two "stereotypical" law school courses, Federal Civil Procedure and Federal Courts, which, fortunately, related directly to my area of practice.

The "non-stereotypical" aspect of my legal personality is reflected in the fact that I teach Jurisprudence,⁴ Legal Philosophy,⁵ and a course on Sexual Orientation and the Law.⁶ In 1992, I served as Chair of the Association of American Law Schools ("AALS") Section on Gay and Lesbian Legal Issues. I was also appointed by the AALS to serve on a "Working Group" to draft guidelines for implementing an AALS bylaw barring member schools from discriminating on the basis of sexual orientation. Finally, almost all of my scholarly writings have been in this area.⁷

I have only a few points to make, first, because the excellent

3. Having grown up as an Air Force "brat," the term "home town" is somewhat of a misnomer. However, to the extent that I have lived in the Boston area since 1963, with the exception of two years in Chicago and another in Kenya, Boston is the closest that I have to a home town.

4. This course grew out of my experience as a Fulbright Lecturer with the Faculty of Law of the University of Nairobi, Kenya, in 1991 to 1992, where I taught Jurisprudence in a seminar format to a small group of graduate students (including a retired member of the Kenya High Court), and to 170 undergraduates in a lecture format. As most of you are undoubtedly aware, with the exception of the United States and Canada, law is an undergraduate concentration.

5. Jurisprudence and Legal Philosophy are essentially the same course. As stated in *Cohen and Cohen's Readings in Jurisprudence and Legal Philosophy*:

Jurisprudence, as the jurist's quest for a systemic vision that will order and illumine the dark realities of the law, and legal philosophy, conceived as the philosopher's effort to understand the legal order and its role in human life, have come close enough together in our land and our generation to warrant a unified approach to these two overlapping fields.

COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, at xvi (Philip Shuchman ed., 2d ed. 1979).

6. In order to reduce any student anxiety that might be created in having a course entitled "Sexual Orientation and the Law" on their law school transcripts, the course is listed in the law school catalogue as "Civil Rights/Non-Traditional Families." This step was taken with the advice and counsel of the law school Registrar.

7. See Robert P. Wasson, Jr., *Overview of AIDS Discrimination Law after Arline*, in 4 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 225 (Barbara M. Wolvovitz ed., 1988); Robert P. Wasson, Jr., *Law and Development in the Third World: Ensuring Protection for the Rights of Criminal Offenders*, in 1 LAW AND DEVELOPMENT IN THE THIRD WORLD 184 (Yash Vyas et al. eds., 1994); Robert P. Wasson, Jr., *The AIDS Crisis as an Impetus to Law Reform in the United States and Kenya*, 17 SUFFOLK TRANSNAT'L L. REV. 1 (1994); Robert P. Wasson, Jr., *AIDS Discrimination Under Federal, State, and Local Law After Arline*, 15 FLA. ST. U. L. REV. 221 (1987).

comments of my fellow panelists make an extensive elaboration of my points unnecessary, and second, because it is important that members of the audience be given sufficient time to pose questions to the panel. To begin with, one needs to write, period. In this regard, it makes no difference whether one writes in traditional or non-traditional areas of the law.⁸ There are two reasons for this. First, if you wish to advance at your present institution, you need to write, and there is no substitute for it.⁹ As Professor Derrick Bell so succinctly stated:

Of course, the sense of many in the law school community that teachers of color gained their jobs by virtue of affirmative action policies rather than by meeting traditional measures of merit does not deter assignment of every imaginable representational role. "We knew you would want to serve on this committee, work with the minority students on their annual conference, speak to this black student who is having trouble with torts, and mediate the differences between the minority students and Professor X who inadvertently told a racist joke in class."

The list is endless and would easily occupy the full time of an assistant dean. And yet such extracurricular duties are seen as part of the minority teacher's job . . . until, of course, the time arrives to evaluate the teacher for promotion and tenure. Then, the entire focus of review is on the quality of the teaching and

8. *But see* Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992) (highlighting the inherently subjective nature of evaluating legal scholarship).

9. One of my colleagues was the only person of color on a law faculty of 50. This person was placed on a university-wide affirmative action committee and was extensively involved with the recruitment and retention of minority students and with serving as an official and unofficial advisor to minority organizations and students. Nevertheless, this individual received no credit for these activities when the time came for promotion from assistant professor to associate professor to full professor.

Two other professors of color at another law school were similarly saddled with minority-related activities. In addition, they served on such weighty faculty committees as faculty hiring and curriculum. One even served as chair of a faculty committee even though this person was untenured. Notwithstanding the fact that both were popular with their colleagues and received good student evaluations, neither received tenure. However, the reason given to me for the denials was that one had produced no scholarly writings and the other had produced only a final draft for which publication in a middle-ranked law review was pending. It was reported further that his piece was criticized by colleagues who taught in the individual's area of expertise for being "unoriginal" and for having "gone over well-plowed ground." One might ask how many of us produce an initial piece of the originality of a Harvard Law Review Supreme Court Forward. One might also ask how original or insightful were the original pieces of the critics. *See* Carl Tobias, *Engendering Law Faculties*, 44 U. MIAMI L. REV. 1143, 1152-53 (1990) (stating that many law schools consider service to the law school and to the broader community as the least important tenure criterion).

writing. Either no allowances are made for the compromises to scholarly activity resulting from time devoted to racial representational roles, or the estimates made for such activity wholly underestimate both the time and energy expended in trying to compensate single-handedly for the school's inability to create a decent learning environment for students who for so many years were entirely excluded or admitted under the token policies now utilized to hire black and brown faculty.¹⁰

Second, if you wish to transfer to another institution, you must have scholarly writings out there. It doesn't matter that one is Mr. or Ms. Chips in the classroom.¹¹ One is simply not going to get a lateral hire on the basis of one's classroom teaching. It is sort of like the old philosophical question: "If a tree falls in the woods and no one is there to hear it, does it make a sound?" The answer is that if there is no one there to hear it, "Who cares?"

Classroom teaching has no lasting reputation beyond the fading recollections of present and former students who actually heard it. Over time, those memories fade and soon there is nothing left. Scholarly writings, by contrast, have an immortality that is contained in the index to legal periodicals, Lexis, and Westlaw.¹²

There are three identifiable approaches to scholarly writing, which are not mutually exclusive. The first is to write generally in the area or areas in which one teaches in order to develop a reputation and expertise in a field of law. The second is to write generally in the area or areas in which one has an interest. One may do so for personal satisfaction or in order to develop a reputation and expertise in a field of law. The third is to write specifically on the issue or issues that one sees as being financially remunerative. This may or may not be in the area in which one teaches. It may or may not be

10. Derrick A. Bell, Jr., *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319, 320-21 (1986); see also Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 355-56 (1989) (describing the almost "intolerable" demands for the one or two minority faculty at law schools to be available to any and all minority students and minority issues).

11. See JAMES HILTON, *GOODBYE MR. CHIPS* (1934). This classic story of a British schoolteacher who becomes a strict authoritarian in the classroom only to later regain his natural compassion as an instructor was made into an academy award winning motion picture. See *GOODBYE MR. CHIPS* (Metro-Goldwyn-Mayer 1939).

12. As a gay African-American man without children, I look upon my scholarly writings as my children. Like children who grow up to have children, and so forth, they are a legacy that continues forever. Similarly, so long as the index to legal periodicals, Lexis, Westlaw, or similar indices exist, I, too, shall have achieved a form of immortality.

in an area in which one has a particular interest. Since the goal is to make oneself marketable, one would certainly wish to develop a reputation or expertise in such a field.

In my case, I could have written in the areas in which I first started teaching—Federal Civil Procedure and Federal Courts—which were the areas in which I had practiced prior to teaching law. In fact, I had surmised that Judge Bork would be nominated by President Reagan for the next appointment to the Supreme Court. As it turned out, Judge Bork was nominated just as I completed the first draft on an article that compared his judicial philosophy on the bench to that expressed in his famous *Indiana Law Journal* article on neutral principles of law.¹³ Once Judge Bork's nomination to the Court was rejected by the Senate,¹⁴ the article was mooted. I thought of turning to a more "stereotypical" piece, like the one on Bork, but came to be drawn to writing on discrimination based on HIV status as more and more of my friends, associates, and former lovers began to die from AIDS.¹⁵

Some may ask whether or not there are any disadvantages to writing in a "non-stereotypical" area. In my view, there aren't any.¹⁶ As people of color, we already have several strikes against us. First, notwithstanding the dearth of minorities at most law schools,¹⁷ and the large pool of qualified minorities,¹⁸ it is claimed

13. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). This article, in turn, was based on an even more famous piece by Herbert Wechsler. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler's article responded to Judge Learned Hand's Lectures at the Harvard Law School in which judicial review was legitimized as merely a necessary inference to "prevent the defeat of the venture at hand." *Id.* at 1-3 (quoting LEARNED HAND, *THE BILL OF RIGHTS* 14 (1958) (reprint of the Oliver Wendell Holmes Lectures)).

14. See Linda Greenhouse, *Bork's Nomination is Rejected* 58-42; *Reagan 'Saddened'*, N.Y. TIMES, Oct. 24, 1987, at 1.

15. At this point I don't know how many have died of AIDS. I stopped counting once the number reached 50.

16. But see Rubin, *supra* note 8 (highlighting the subjectivity inherent in evaluating legal scholarship).

17. See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 539 (1988). Chused reports that:

Racial tokenism is alive and well at American law schools. About one-third of all schools in this study have no black faculty members. Another third have just one. Less than a tenth have more than three. In percentage terms, less than fifteen percent of law schools have more than six percent of their faculty positions held by black people.

Id. (footnote omitted).

Chused adds that "[o]nly about one-fourth of law schools surveyed, a total of

that we simply are not "out there."¹⁹ We are viewed as incompetent affirmative action hires who diminish the likelihood that competent white men will be hired.²⁰ This is particularly so with respect to minority women.²¹ Second, too often the term minority is

thirty-nine schools, have more than six percent of their faculty positions occupied by minority persons." *Id.* at 540. He concludes:

There were only thirty-five more tenured black professors in 1987 at the 144 non-minority-operated schools in the sample than there were in 1981. This represents an increase of only about one-quarter of a person per institution. The number of tenure track black professors increased by only sixteen in the same time period, or about one-ninth of a person per institution.

Id. at 540-41.

18. See Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 CHI.-KENT L. REV. 331, 338 (1992) (addressing the "myth" of a lack of qualified minority law professors); Merritt & Reskin, *supra* note 1. Merritt and Reskin reported that more than one-sixth of minority hires graduated from Harvard Law School and that nearly another sixth graduated from Yale Law School. See *id.* at 2323. Roughly 20% of the minorities served on the main law review at their school and another 15% served on the secondary law review. See *id.* at 2324. Finally, nearly 30% of the minorities clerked for a judge following law school, with roughly 25% of these having been with a federal judge. See *id.* at 2325.

By way of comparison, approximately one-third of all law professors graduated from Harvard, Yale, Columbia, Chicago, or Michigan. See Borthwick & Schau, *supra* note 1, at 194 & n.19. Approximately 50% of men and 40% of women hired as law faculty during the 1980s had law review experience. See *id.* at 205, 206. Finally, 36% of the men and 44% of the women hired as law faculty during the 1980s had some kind of judicial clerkship following graduation from law school. See *id.* at 208.

19. See Chused, *supra* note 17, at 555 (arguing that aggressive commitment must be undertaken by American law schools to recruit and hire minority and women faculty); Bell, *supra* note 10, at 321 (no aggressive search for minority candidates is made until the law school administration is pressured to do so by minority students and liberal white faculty, and once such an effort is undertaken, qualified minorities are miraculously found).

20. See Karen Skelton, *Bay Area Law Schools Hiring More Women and Minorities*, AM. LAW. MEDIA, Mar. 7, 1991, at 1 (quoting Dean Paul Brest of Stanford Law School, who stated: "It's not a good day for white males. I'm glad I have my job here."). Such a comment might only be partially justified as an overreaction to those who have deemed the dearth of minorities to justify racial quotas in the hiring process. See, e.g., Herma Hill Kay, *The Need for Self-Imposed Quotas in Academic Employment*, 1979 WASH. U. L.Q. 137; Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986).

21. See Merritt & Reskin, *supra* note 1. Notwithstanding the assumption that women of color would command a premium in law teaching because they "simultaneously satisfy student and faculty demands for female professors and for minority ones," *id.* at 2300, Merritt and Reskin discovered that minority women who joined law school faculties between the fall of 1986 and the spring of 1991 "began teaching at significantly lower ranks than the minority men, obtained positions at significantly less prestigious schools, and were significantly more likely to teach low-status courses like legal writing or trusts and estates." *Id.* at 2301. Furthermore, "[n]one of these disparities can be adequately explained through differences in credentials, age, work experience, geographic constraints, or family ties. Instead, law schools seem to treat minority women less favorably than minority men." *Id.*; see also Tobias, *supra* note 9, at 1145. Tobias

viewed as synonymous with African-American to the disadvantage of non-African-American minorities.²² Third, law schools are often hostile environments, leading to the high turnover of minority faculty for more congenial environments.²³ Finally, because students often view the minority law professor as an affirmative action hire, he or she is not accorded the presumption of competence accorded to white professors.²⁴ As a result, the minority law professor faces a larger risk of being trashed in the student evaluation

indicated that problems of recruiting and tenuring are not limited to *minority* females by pointing out that approximately 20% of law schools, particularly the so-called "elite" law schools, comprise over 25% of a "laggard group" of schools where the percentage of women during the period from 1986 to 1987 was substantially less than the 1981 to 1982 average of 12% female. *Id.* at 1145 & n.11. Tobias identified these "elite" law schools as the same ones listed by Richard Chused in his study published in the *University of Pennsylvania Law Review*, namely: University of California at Berkeley, University of California at Los Angeles, University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, George Washington University, Harvard University, University of Illinois, University of Michigan, University of Minnesota, New York University, Northwestern University, University of Pennsylvania, University of Southern California, Stanford University, University of Texas, Vanderbilt University, University of Virginia, University of Wisconsin, and Yale University. *See id.* at 1145 n.12 (citing Chused, *supra* note 17, at 549 n.65); *see also*, Carl Tobias, *Respect for Diversity: The Case of Feminist Legal Thought*, 58 U. CIN. L. REV. 175 (1989) (listing Harvard University, University of Pennsylvania, and Yale University as having some particularly nasty battles over the granting of tenure to women).

22. *See* Merritt & Reskin, *supra* note 1, at 2316 ("Among the minority professors, 73.5% were African American, 16.2% were Hispanic, 7.7% were Asian American, and 1.7% were Native American."); *see also* Chused, *supra* note 17, at 538 (reporting that the Hispanic proportion of majority-run faculties went from 0.5% during the period from 1980 to 1981 to only 0.7% in 1986 to 1987, and that the proportion of other minorities went from 0.5% to 1.0% during the same period); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 51 (1994) ("Whereas approximately 3.5% of law students are Asian American, only approximately 0.9% of law faculty are Asian American."); *id.* at 52 n.230 (in 1988, for example, only one out of 313 newly hired full-time faculty members was Asian American); Mary Ann Brigantti-Hughes, *Underrepresentation in Law Schools of Puerto Ricans, Latinos is Appalling*, N.Y. L.J., May 1, 1992, at S4 ("Of the 5,700 law teachers in the 180 accredited law schools in the nation, five are Puerto Rican, 20 are Mexican-American, and 10 are other Latino.").

23. *See* Chused, *supra* note 17, at 544-46. The alienation of minority faculty members may be illustrated, in part, by a comment made by Derrick Bell:

It is not easy to describe the feeling of despair when the faculty rejects a qualified teacher of color who you know full well they would quickly hire were you to suffer a heart attack and drop dead. "Is it," the minority teacher wonders, "that I am doing such a good job that they see no need to hire others like myself? Or is it, rather, that my performance is so poor that they refuse to hire anyone else for fear of making another serious mistake?"

Bell, *supra* note 10, at 322; *see also* Harris, *supra* note 18, at 343.

24. *See* Bell, *supra* note 10, at 320.

process²⁵ or of having students complain about his or her teaching either directly to the professor²⁶ or to the administration.²⁷ These problems are exacerbated to the extent that the administration treats any and all complaints by white students against minority professors as legitimate,²⁸ rationalizes student evaluations to serve a racist purpose,²⁹ or dismisses unfavorable student evaluations of white tenure candidates favored by the administration and faculty.³⁰

25. See Delgado, *supra* note 10, at 361.

26. See *id.* at 359 (discussing submission of a memorandum by a first-year white male student which reviewed the minority law teacher's classroom performance, noting his deficiencies and giving suggestions on how the teacher, who had come to law teaching following an impressive career in law practice, could correct them); *id.* at 360 (describing student delegation's visit to a Hispanic professor in which the professor was criticized both for moving too fast and for moving too slow through the course material).

27. See *id.* at 353 n.14. Delgado described an incident in which Derrick Bell, a leading African-American scholar,

taught Constitutional Law as a visiting professor to a section of first-year law students at Stanford. After a few weeks, the professor was invited to give a lecture in a noon "enrichment" series on constitutional law offered at the law school. Unknown to the professor, the faculty had initiated the series in response to complaints from his students over the way the course was being taught.

Id.

28. At three separate law schools with which the author is familiar, the Dean himself listens to student complaints by white students. He is sympathetic to their concerns and indicates that the patient (the minority professor) does indeed suffer from a serious pathology and has a faint pulse, but that the situation will be monitored to determine whether or not he or she will survive.

29. At one law school, a minority tenure candidate's student evaluations were reviewed. The evaluations were generally good. The faculty then compared the evaluations with those of other faculty who taught the first-year course. Although each faculty member receives a computer print-out of how their student evaluations compare to those of other faculty members as a whole, there is no official attempt to compare a professor's student evaluations to those of other professors who teach the same course. Furthermore, this law school's tenure policy did not even indicate that such comparisons would be made. Unless the minority tenure candidate was advised privately in advance that such a comparison would be made, she would have had no way of knowing that her generally good student evaluations would be used against her in this ad hoc manner. At this point, the fact that the minority professor's evaluations in the first year required course were marginally lower than those of colleagues who taught the same course was cited to urge a negative tenure vote. By contrast, a senior faculty member, convinced that the candidate was not properly teaching her upper-level elective, dismissed her uniformly superior student evaluations with the comment, "these are students, they don't realize that they are not being taught anything." The woman was ultimately denied tenure by the faculty at this meeting.

30. See Delgado, *supra* note 10, at 361 ("[W]hen white males get low numbers, they may be over-looked or explained away: 'Joe got poor numbers in Civil Procedure because he is so rigorous; and what do students know anyway?'").

It should be added that the so-called "non-stereotypical" area in which I write is now so mainstream, and there are now so many straight men and women who write in it,³¹ that it would almost be tragic for someone who has an interest in it to avoid the area because it is just "too" non-stereotypical.

Let me make just one final point. Mentoring is important. We all need support and encouragement instead of criticism. Unfortunately, colleagues at your respective home institutions who will sit in judgment of you when it comes time for promotion and tenure will dismiss the fact that each page of your draft was marked "First Draft," and will forever damn you as the person who cannot write. To avoid this, I offer myself as someone willing to review your pieces. The fact that I don't teach in the area of your research should not be a problem.³²

Thank you for your time and enjoy the rest of the conference.

31. For example, one of my colleagues, a married, straight, white man just completed an excellent law review article on using Title VII to fight same-sex sexual harassment. Someone was prescient to name my AALS section the "Section on Gay & Lesbian Legal Issues" as opposed to the "Section for Gays & Lesbians" as an incredibly large portion of our membership is comprised of straight men and women for whom our concerns are leading edge and not fringe esoterica.

32. Except for this paper, the author generally asks his father to review his drafts. The author's father was in the Air Force for 29 years and, thereafter, served for 15 years as vice-president of the New England region for a high-tech company. He is a non-lawyer but a fairly intelligent person. He is also the author's biggest fan. He has never failed to pick out faulty logic, strident emotionalism, and mistakes of sixth grade grammar that the author is wont to make.